

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

CARL OTIS SULLIVAN,

Case No. 2:05-cv-00448-MMD-NJK

Petitioner,

ORDER

v.

WARDEN NEVINS, *et al.*,

Respondents.

I. INTRODUCTION

This habeas corpus action is brought by Carl Otis Sullivan, who is serving prison terms on convictions in Nevada's Second Judicial District Court, based on guilty pleas pursuant to a plea agreement, for robbery, burglary, and possession of stolen property. Sullivan's convictions all result from his burglary of a Reno, Nevada, home, his robbery of an automobile, and his possession of stolen property taken from the home. Sullivan's amended habeas petition is before the Court on the merits of his claims. The Court will deny all the claims asserted by Sullivan in his amended petition, and the Court will deny Sullivan a certificate of appealability.

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

As Sullivan's conviction was upon a guilty plea, before trial, the facts regarding his crimes have not been fully developed. However, the presentence investigation report, prepared for purposes of Sullivan's sentencing, and filed as an exhibit by him in this action, states the following:

1 The following information has been obtained from the file of the
2 Washoe County District Attorney's Office which includes reports of the
Reno Police Department.

3 At approximately 10:05 A.M., on December 4, 1997, officers of the
4 Reno Police Department were dispatched to 543 California Avenue,
5 regarding a vehicle theft which had just occurred. Dispatch was informed
that the vehicle was taken by a suspect wielding a knife and a description
of the vehicle was broadcast.

6 At approximately 10:15 A.M., the Washoe County Sheriff's Office
7 helicopter "Raven" located the vehicle in the area of Swope Middle School
and units of the Reno Police Department responded. A high-risk stop was
8 made and the lone occupant, later identified as the defendant, was
removed from the vehicle. The defendant was restrained and Mr. Sullivan
9 spontaneously stated, "I knew I had nowhere to go when I heard the
helicopter over me." The officers located a black leather sheath containing
10 a black handled knife with a blade of approximately four inches on the
defendant's belt.

11 Other officers of the Reno Police Department contacted the victim
12 at his residence. The victim informed that he had arrived home at
approximately 10:00 A.M., and when he entered the garage, observed the
13 suspect later identified as the defendant, leaning against his Mercedes
Benz. The victim said he commanded the suspect to leave, at which time
14 Mr. Sullivan unsheathed his knife and ran towards the victim in an attempt
to stab him. The victim then backed out of the garage.

15 The victim stated that the defendant then got into his Mercedes
Benz and backed out of the garage. The victim related he then closed the
16 gate to the street and as he was doing so, the defendant accelerated the
vehicle, causing the victim to get out of the way. The vehicle then crashed
17 through the gate and portions of the gate struck the victim and his dog.
The victim received an injury to his leg, but he declined medical attention.

18 Investigation at the scene disclosed that Mr. Sullivan had
19 apparently gone through two downstairs bedrooms and one upstairs
bedroom looking for items to steal. A safe of approximately 24" x 24" was
20 found in the garage and the victim said that it had previously been stored
upstairs. The point of entry was on the east side with a screen being
21 removed and the window broken.

22 The officers recovered stolen property valued in excess of \$99,000
23 from the defendant's person and inside the victim's stolen vehicle.

24 The property included jewelry, precious coins, two mink coats,
sterling silver silverware, and cameras.

25 The victim was brought to the scene and identified the items taken
26 from the vehicle and from the defendant as belonging to him. The victim
also positively identified the defendant, and Mr. Sullivan when hearing the
27 identification stated, "Well, no shit, Sherlock." The victim's property was
photographed and returned to the victim, excluding his vehicle. The
28 defendant was arrested and transported to the Washoe County Jail.
During the booking process, the defendant asked "How much time do you

1 think I will get” and “How much time can you get for burgin a house.”
2 When the defendant was advised of all charges, he stated, “I’ve really
3 done it to myself this time.” The defendant was then booked without
4 further incident.

5 Presentence Investigation Report, Exhibit 44, pp. 5-7; see also Transcript of
6 Proceedings of August 6, 2003, Exhibit 30, pp. 49-50, 70 (testimony of Sullivan at
7 evidentiary hearing, recounting his commission of the crimes).¹

8 Sullivan waived a preliminary hearing, and on December 29, 1997, was charged
9 by information with robbery with the use of a deadly weapon, burglary, and possession
10 of stolen property. See Exhibits 2 and 3.

11 On January 7, 1998, Sullivan entered a plea agreement. Guilty Plea
12 Memorandum, Exhibit 4. Sullivan agreed to plead guilty to the charges in the
13 information. *Id.* The State agreed, with regard to Sullivan’s sentence, that it would
14 “concur with the recommendation of the Division of Parole and Probation.” *Id.* at 4. The
15 State also agreed not to pursue any other charges against Sullivan. See Transcript of
16 Proceedings of January 8, 1998, Exhibit 5, pp. 2-4. Additionally, the State agreed not to
17 pursue the deadly-weapon enhancements. *Id.* at 3-4. On January 7, 1998, Sullivan
18 entered his guilty pleas, pursuant to the plea agreement. See *id.*

19 Sullivan’s sentencing hearing was on February 13, 1998. See Transcript of
20 Proceedings of February 13, 1998, Exhibit 7. The Division of Parole and Probation
21 recommended: a prison term of 156 months, with minimum parole eligibility of 35
22 months, for the robbery; a consecutive prison term of 96 months, with minimum parole
23 eligibility of 22 months, for the burglary; and a consecutive prison term of 96 months,
24 with minimum parole eligibility of 22 months, for possession of stolen property.
25 Presentence Investigation Report, Exhibit 44, p. 12. At the sentencing hearing,
26 Sullivan’s counsel presented to the court a letter from a doctor, regarding Sullivan’s

27 ¹The exhibits referred to in this order are those filed by Sullivan and located in
28 the record at dkt. nos. 15 through 23, and those filed by respondents and located in the
record at dkt. no. 39.

1 substance abuse, its effect on his commission of the crimes, and his willingness to seek
2 treatment, and counsel argued for a lesser sentence, specifically, that the three
3 sentences run concurrently. See Transcript of Proceedings of February 13, 1998,
4 Exhibit 7, pp. 3-5. The prosecutor responded, discussing Sullivan's significant prior
5 criminal record, the serious nature of the crimes he committed in this case, Sullivan's
6 lack of remorse, and the danger he posed to the community, and the prosecutor asked
7 the court to impose consecutive sentences as recommended by the Division of Parole
8 and Probation. *Id.* at 5-7. The victims then made statements. *Id.* at 7-12. Sullivan also
9 made a statement. *Id.* at 12-14. The court sentenced Sullivan as recommended by the
10 Division of Parole and Probation: a prison term of 156 months, with minimum parole
11 eligibility of 35 months, for the robbery; a consecutive prison term of 96 months, with
12 minimum parole eligibility of 22 months, for the burglary; and a consecutive prison term
13 of 96 months, with minimum parole eligibility of 22 months, for possession of stolen
14 property. *Id.* at 14-15; see also Order of Amended Judgment, Exhibit 23. The court also
15 ordered Sullivan to pay restitution in the amount of \$12,000. Transcript of Proceedings
16 of February 13, 1998, Exhibit 7, p. 14; Order of Amended Judgment, Exhibit 23.

17 Sullivan appealed. See Notice of Appeal, Exhibit 9. On December 13, 1999, the
18 Nevada Supreme Court determined that there was an error in the judgment with respect
19 to the robbery conviction; Sullivan pled guilty to robbery without use of a deadly
20 weapon, but the judgment of conviction indicated that the robbery was with use of a
21 deadly weapon. *Sullivan v. State*, 115 Nev. 383, 390-91, 990 P.2d 1258 (1999) (the
22 Nevada Supreme Court's opinion is found in the record at Exhibit 12). The court
23 affirmed, but remanded the case to the state district court for the limited purpose of
24 correcting the clerical mistake in the judgment. *Id.* at 391; see also *Sullivan v. State*, 120
25 Nev. 537, 538, 96 P.3d 761 (2004). On January 3, 2000, the state district court entered
26 a corrected judgment. Exhibit 15. The Nevada Supreme Court's remittitur issued on
27 January 10, 2000. Exhibit 14.

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1 On May 10, 2000, Sullivan filed, in the state district court, a petition for writ of
2 habeas corpus. Exhibit 16.

3 On December 11, 2001, while Sullivan's state-court habeas petition was pending
4 in the state district court, apparently realizing that the corrected judgment was entered
5 before the Nevada Supreme Court's remittitur issued, the state district court vacated the
6 corrected judgment (Exhibit 22), and entered a new Order of Amended Judgment
7 (Exhibit 23).

8 Counsel was appointed for Sullivan for his state-court habeas petition, and
9 counsel supplemented his petition. Exhibits 24, 49. On August 6, 2003, the state district
10 court held an evidentiary hearing. Transcript of Proceedings of August 6, 2003, Exhibit
11 30. Sullivan's trial counsel testified. *Id.* at 7-45. Sullivan also testified. *Id.* at 46-71. In an
12 order entered September 17, 2003, the state district court denied Sullivan's petition.
13 Findings of Fact, Conclusions of Law and Judgment, Exhibit 32.

14 Sullivan appealed. See Notice of Appeal, Exhibit 34; Fast Track Statement,
15 Exhibit 36. The Nevada Supreme Court affirmed on March 5, 2004. *Sullivan v. State*,
16 120 Nev. 537, 96 P.3d 761 (2004) (the Nevada Supreme Court's opinion is found in the
17 record at Exhibit 42).

18 This court received from Sullivan a pro se habeas petition, and a request for
19 appointment of counsel, on March 31, 2005 (dkt. nos. 8, 9). Counsel was appointed
20 (dkt. nos. 7, 10). On January 19, 2006, counsel filed an amended habeas petition on
21 Sullivan's behalf (dkt. no. 14).

22 On February 22, 2006, respondents filed a motion to dismiss (dkt. no. 28),
23 arguing that Sullivan's petition is untimely, that certain claims are unexhausted, and that
24 certain claims are barred by the doctrine of procedural default. On August 21, 2006, the
25 Court granted the motion to dismiss, ruling Sullivan's petition barred by the statute of
26 limitations. Order entered August 21, 2006, dkt. no. 43. In that order, the Court also
27 ruled that the petition was not barred by the procedural default doctrine. *Id.* The Court

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1 did not address the question of the exhaustion of Sullivan's claims in state court. *Id.*
 2 The action was dismissed. *Id.*; Judgment, dkt. no. 44.

3 Sullivan appealed (dkt. no. 45). The court of appeals reversed in part, and
 4 remanded the case to this Court for further consideration of the potential impact of the
 5 intervening authority in *Harris v. Carter*, 515 F.3d 1051 (9th Cir.), *cert. denied*, 555 U.S.
 6 967 (2008), upon this Court's ruling that Sullivan had not established a basis for
 7 equitable tolling. Memorandum Order of Court of Appeals, dkt. no. 53.

8 On remand, on March 31, 2009, this Court again granted the motion to dismiss,
 9 and dismissed the action as time-barred. Order entered March 31, 2009, dkt. no. 64;
 10 Judgment, dkt. no. 65.

11 Sullivan again appealed (dkt. no. 66). On July 21, 2010, the court of appeals
 12 vacated the judgment and remanded, ruling that Sullivan was entitled to equitable tolling
 13 and that his federal habeas petition was, therefore, timely filed. Memorandum Order of
 14 Court of Appeals, dkt. no. 76.

15 Following that remand, respondents filed their answer on February 24, 2011 (dkt.
 16 no. 85), and Sullivan filed a reply on May 2, 2011 (dkt. no. 90).

17 **III. STANDARD OF REVIEW OF MERITS OF SULLIVAN'S CLAIMS**

18 28 U.S.C. § 2254(d) sets forth the standard of review, applicable to this case,
 19 under the Antiterrorism and Effective Death Penalty Act (AEDPA):

20 An application for a writ of habeas corpus on behalf of a person in
 21 custody pursuant to the judgment of a State court shall not be granted with
 respect to any claim that was adjudicated on the merits in State court
 proceedings unless the adjudication of the claim –

22 (1) resulted in a decision that was contrary to, or
 23 involved an unreasonable application of, clearly established
 24 Federal law, as determined by the Supreme Court of the
 United States; or

25 (2) resulted in a decision that was based on an
 26 unreasonable determination of the facts in light of the
 evidence presented in the State court proceeding.

27 28 U.S.C. § 2254(d).

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1 A state court decision is contrary to clearly established Supreme Court
2 precedent, within the meaning of 28 U.S.C. § 2254, “if the state court applies a rule that
3 contradicts the governing law set forth in [the Supreme Court’s] cases” or “if the state
4 court confronts a set of facts that are materially indistinguishable from a decision of [the
5 Supreme Court] and nevertheless arrives at a result different from [the Supreme
6 Court’s] precedent.” *Lockyer v. Andrade*, 538 U.S. 63, 73 (2003) (quoting *Williams v.*
7 *Taylor*, 529 U.S. 362, 405-06 (2000), and citing *Bell v. Cone*, 535 U.S. 685, 694 (2002)).

8 A state court decision is an unreasonable application of clearly established
9 Supreme Court precedent, within the meaning of 28 U.S.C. § 2254(d), “if the state court
10 identifies the correct governing legal principle from [the Supreme Court’s] decisions but
11 unreasonably applies that principle to the facts of the prisoner’s case.” *Lockyer*, 538
12 U.S. at 75 (quoting *Williams*, 529 U.S. at 413). The “unreasonable application” clause
13 requires the state court decision to be more than incorrect or erroneous; the state
14 court’s application of clearly established law must be objectively unreasonable. *Id.*
15 (quoting *Williams*, 529 U.S. at 409).

16 The Supreme Court has further instructed that “[a] state court’s determination
17 that a claim lacks merit precludes federal habeas relief so long as ‘fairminded jurists
18 could disagree’ on the correctness of the state court’s decision.” *Harrington v. Richter*,
19 131 S.Ct. 770, 786 (2011) (citing *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)).
20 The Supreme Court has also emphasized “that even a strong case for relief does not
21 mean the state court’s contrary conclusion was unreasonable.” *Id.* (citing *Lockyer*, 538
22 U.S. at 75; see also *Cullen v. Pinholster*, 131 S.Ct.1388, 1398 (2011) (describing the
23 AEDPA standard as “a difficult to meet and highly deferential standard for evaluating
24 state-court rulings, which demands that state-court decisions be given the benefit of the
25 doubt”) (internal quotation marks and citations omitted).

26 The state court’s “last reasoned decision” is the ruling subject to section 2254(d)
27 review. *Cheney v. Washington*, 614 F.3d 987, 995 (9th Cir. 2010). If the last reasoned
28 state-court decision adopts or substantially incorporates the reasoning from a previous

1 state-court decision, a federal habeas court may consider both decisions to ascertain
2 the state court's reasoning. See *Edwards v. Lamarque*, 475 F.3d 1121, 1126 (9th
3 Cir.2007) (en banc).

4 If the state supreme court denies a claim but provides no explanation for its
5 ruling, the federal court still affords the ruling the deference mandated by section
6 2254(d); in such a case, the petitioner is entitled to federal habeas corpus relief only if
7 "there was no reasonable basis for the state court to deny relief." *Harrington*, 131 S.Ct.
8 at 784.

9 The analysis under section 2254(d) looks to the law that was clearly established
10 by United States Supreme Court precedent at the time of the state court's decision.
11 *Wiggins v. Smith*, 539 U.S. 510, 520 (2003).

12 **IV. ANALYSIS**

13 **A. Ground 1**

14 In Ground 1 of his amended habeas petition, Sullivan claims that he was
15 "deprived of his due process rights guaranteed by the Fifth and Fourteenth
16 Amendments to the United States Constitution by the State's breach of its plea
17 agreement with Sullivan during the sentencing proceedings." Amended Petition (dkt. no.
18 14), p. 5.

19 In the plea agreement, the State agreed, with regard to Sullivan's sentence, that
20 it would "concur with the recommendation of the Division of Parole and Probation."
21 Guilty Plea Memorandum, Exhibit 4, p. 4. The Division of Parole and Probation
22 recommended consecutive sentences. Presentence Investigation Report, Exhibit 44, p.
23 12. Sullivan's counsel presented to the court a letter from a doctor, regarding Sullivan's
24 substance abuse, its effect on his commission of the crimes, and his willingness to seek
25 treatment, and he argued for a lesser sentence, specifically, that the three sentences
26 run concurrently. See Transcript of Proceedings of February 13, 1998, Exhibit 7, pp. 3-
27 5. The prosecutor responded to that argument, discussing Sullivan's significant prior
28 criminal record, the serious nature of the crimes he committed in this case, Sullivan's

1 lack of remorse, and the danger he posed to the community, and the prosecutor asked
2 the court to impose consecutive sentences as recommended by the Division of Parole
3 and Probation. *Id.* at 5-7. Citing *Santobello v. New York*, 404 U.S. 257 (1971), Sullivan
4 contends that this amounted to a breach of the plea agreement, in violation of his
5 federal constitutional rights.

6 Regarding this claim, the Nevada Supreme Court ruled as follows:

7 The issue before this court is whether the state breaches an
8 agreement to concur with the recommendation of the Division of Parole
9 and Probation by advocating in favor of the recommendation. [Footnote
10 omitted.] We conclude that the state may advocate in favor of a sentence
11 that it has agreed to recommend as part of a plea agreement so long as
the state does not explicitly or implicitly seek to persuade the sentencing
court to impose a harsher sentence than that which the state agreed to
recommend. We further conclude that the state did not breach the plea
agreement.

12 * * *

13 The state charged appellant Carl Otis Sullivan by information with
14 one count each of robbery with the use of a deadly weapon, burglary, and
possession of stolen property. Pursuant to plea negotiations, Sullivan
15 agreed to plead guilty to the charges. In exchange for Sullivan's guilty
16 plea, the state agreed to concur with the recommendation of the Division
of Parole and Probation. The district court conducted a thorough plea
canvass and accepted Sullivan's guilty plea.

17 The Division of Parole and Probation prepared a presentence
18 report. Therein, the Division recommended the following sentences, all to
be served consecutively: 35 to 156 months for robbery; 22 to 96 months
19 for burglary; and 22 to 96 months for possession of stolen property.

20 At sentencing, defense counsel argued in favor of concurrent
sentences based on a letter from a doctor, which had become available
21 after the presentence report had been prepared. The letter indicated that
the underlying offenses were the result of a long-term drug addiction and
22 that Sullivan had accepted responsibility for his actions and addiction, and
was willing to seek treatment. Counsel argued that giving Sullivan
23 concurrent sentences would still give him considerable prison time but
would also give him an opportunity to get treatment sooner rather than
24 later. In response, the prosecutor addressed Sullivan's "quite incredible
criminal history" and the serious nature of the charged offenses. The
25 prosecutor further suggested that if Sullivan were truly serious about
rehabilitation, then he could pursue that avenue after his release from
26 prison regardless of the length of the sentence. The prosecutor
concluded: "The only thing he has proven is that his level of violence is
27 most certainly escalating and certainly putting this community in a great
deal of danger. As a result, the consecutive sentences are appropriate,
28 your Honor." Sullivan did not object to any of the prosecutor's comments.

1 the plain language of such an agreement to restrict the state's right to
2 make certain types of statements to the court that would influence the
3 sentencing decision. [Footnote omitted.] See *id.*; *Block*, 660 F.2d at
4 1090-91. If the state has entered such an agreement but nonetheless
5 intends to present information that might influence the sentence, it must
6 make such an intention explicit in the plea agreement and reserve the
7 right to present facts and argument pertaining to sentencing. See
8 *Diamond*, 706 F.2d at 106 (government promised not to recommend "any
9 specific sentence" but reserved right to present court with "relevant
10 information" at sentencing). Where the state fails to make such a limited
11 promise clear, it may not "attempt[] to influence the sentence by
12 presenting the court with conjecture, opinion, or disparaging information
13 already in the court's possession." *Block*, 660 F.2d at 1091, *quoted in*
14 *Statz*, 113 Nev. at 994-93, 944 P.2d at 817.

15 However, a promise to recommend a sentence is not a promise to
16 stand silent. Where the state agrees to make a particular
17 recommendation, the agreement, unlike an agreement to stand silent or
18 make no recommendation, does not by its terms restrict the state's right to
19 argue or present facts in favor of the sentence recommendation. Under
20 such circumstances, the plea agreement cannot reasonably be
21 understood to preclude the state from presenting facts or argument in
22 favor of the recommended sentence. [Footnote omitted.] Thus, the state
23 is not required to explicitly reserve the right to argue in favor of a
24 recommended sentence where it has promised to recommend a certain
25 sentence. [Footnote omitted.]

26 Nonetheless, the state must be careful that in exercising this right it
27 does not explicitly or implicitly undercut the sentencing recommendation
28 by attempting to persuade the sentencing court to impose a harsher
sentence than that which it agreed to recommend. "*Santobello* prohibits
not only 'explicit repudiation of the government's assurances, but must in
the interests of fairness be read to forbid end-runs around them.'" *United*
States v. Canada, 960 F.2d 263, 269 (1st Cir.1992) (quoting *United States*
v. Voccola, 600 F.Supp. 1534, 1537 (D.R.I.1985)). A prosecutor's overall
conduct must be reasonably consistent with the recommendation. *Id.*
Thus, in arguing in favor of a sentencing recommendation that the state
has agreed to make, the prosecutor must refrain from either explicitly or
implicitly repudiating the agreement. Our decision in *Kluttz v. Warden*, 99
Nev. 681, 669 P.2d 244 (1983) illustrates this proscription.

In *Kluttz*, the prosecutor agreed to recommend a sentence of no
more than two years. 99 Nev. at 682, 669 P.2d at 244. However, at
sentencing, the prosecutor explained that he was unaware of the
defendant's prior record at the time he negotiated the plea agreement and
then addressed that record. *Id.* at 682-83, 669 P.2d at 244-45. This court
recognized that the prosecutor did not expressly violate the plea
agreement because he asked for a two-year sentence. *Id.* at 684, 669
P.2d at 245. Nonetheless, this court concluded:

[I]n advising the sentencing judge that the state had
entered into the plea bargain without knowledge of all of the
salient facts, the prosecutor implicitly was seeking a
sentence in excess of two years. The vice in the state's
conduct was not that it mentioned [the defendant's] prior

1 criminal record, but its insinuation that the plea bargain
2 should not be honored.

3 *Id.* (citation omitted). Accordingly, this court concluded that the
4 prosecutor's comments violated the spirit of the plea agreement. *Id.* at
5 684, 669 P.2d at 246; see also *Wolf v. State*, 106 Nev. 426, 794 P.2d 721
(1990) (concluding that prosecutor breached spirit of agreement to argue
for sentence of no more than five years by implicitly arguing for
presentence report's recommendation of nine years).

6 In this case, the state did not agree to stand silent or refrain from
7 making a recommendation. Rather, the state agreed to make a specific
8 recommendation — it agreed to concur in the recommendation of the
9 Division of Parole and Probation. We therefore conclude that Sullivan
10 could not have reasonably understood the agreement to restrict the state's
right to argue in favor of the sentence recommendation. [Footnote:
Although not dispositive, Sullivan's failure to object to the prosecutor's
comments as a breach of the plea agreement evidences Sullivan's
understanding that the agreement did not preclude those comments.]

11 Moreover, we conclude that the prosecutor did not breach the plea
12 agreement. The prosecutor complied with the plea agreement by
13 concurring in the recommendation of the Division of Parole and Probation.
14 The prosecutor's specific comments about Sullivan's criminal record and
15 the circumstances of the instant offenses were clearly intended to support
16 the sentencing recommendation that the state agreed to make. Nothing in
the prosecutor's comments implicitly or explicitly sought a harsher
sentence than the state agreed to recommend. Thus, the comments did
not undercut the sentence recommendation. We therefore conclude that
the prosecutor did not breach the terms or the spirit of the plea agreement.

* * *

17 We conclude that the plea agreement in this case did not preclude
18 the state from arguing in favor of the sentence recommendation. We
19 further conclude that the prosecutor's comments at sentencing did not
breach the spirit or the terms of the plea agreement.

20 *Sullivan*, 115 Nev. at 385-91, 990 P.2d at 1259-63.

21 This Court agrees with the conclusion reached by the Nevada Supreme Court.
22 The plea agreement did not preclude the State from arguing in favor of the sentence
23 that it agreed to -- the sentence recommended by the Division of Parole and Probation.
24 As agreed, the prosecutor specifically asked the court to impose the sentence
25 recommended by the Division of Parole and Probation. See Transcript of Proceedings
26 of February 13, 1998, Exhibit 7, p. 12 ("Your Honor, if I may just make the record clear,
27 the State asks that you follow the recommendation by the Division of Parole and
28 Probation."). The prosecutor's arguments at the sentencing were wholly consistent with

1 the State's agreement to concur with the recommendation of the Division of Parole and
2 Probation. There was no violation of the terms or spirit of the plea agreement.

3 The ruling of the Nevada Supreme Court was not contrary to, or an unreasonable
4 application of, *Santobello*, and was not based on an unreasonable determination of the
5 facts in light of the evidence.

6 **B. Ground 2**

7 In Ground 2, Sullivan claims that he "was deprived of his right to due process and
8 a fair trial guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United
9 States Constitution due to the improper victim impact statements which were highly
10 speculative and highly prejudicial." Amended Petition, p. 7.

11 The two victims of Sullivan's crimes made statements at the sentencing hearing.
12 The statement of the first of the victims was as follows:

13 Thank you, your Honor. I wrote this so I wouldn't forget anything.
14 On December 4th, when Mr. Sullivan broke into my home, my [fiancé] and
15 I both became victims of Mr. Sullivan. This home has been in my family
16 since 1922, and it's always been a secure place, but at this time, I'm
17 unable to sleep. I'm being treated for stress headaches. There's over a
thousand dollars of my own money that's not even covered by insurance
to repair the damages that Mr. Sullivan did to my home. The total
damages are over \$12,000. The car that he drove through my front gate is
still in the shop. I'm unable to drive it.

18 My [fiancé], who was there at the time, is the one that's really
19 suffered most of the damage. He was about to start a new job at the time
20 of this crime and his company had gone out of business, and when Mr.
Sullivan drove my car right through the front gate, he damaged the
cartilage in [his] knees and he can't work at a full time basis right now.

21 To me it's apparent that Mr. Sullivan was willing to kill to commit
22 this crime, to steal belongings from my house. That's all I have to say,
your Honor.

23 Transcript of Proceedings of February 13, 1998, Exhibit 7, pp. 7-8. The statement of the
24 other victim was as follows:

25 I have something I'd like to read here. First date that stands out in
26 my mind is that Carl Sullivan broke into my home in the professional
27 manner in which he proceeded. When I walked in on him while he was
loading up the car with valuables from my home, he was very methodical
in the way he finished loading the car with what was already in his hands
and whipped out a knife, had pointed at his side all in one, smooth motion.
28 At that point it was clear to me that Carl Sullivan had already thought

1 about the possibility that he might be interrupted by a homeowner during
2 this crime and that he had prepared himself for that occasion.

3 Not only did Carl Sullivan not run off after being confronted and told
4 me to leave my home, he lunged after me with his weapon. I'm a good-
5 sized guy, but the behavior of Carl Sullivan disturbed me. His demeanor
6 was that of a man who had killed to obtain his goal which, in this case,
7 was to make off with about a hundred thousand dollars worth of valuables
8 from my home.

9 So many things went through my mind. What if my mother or my
10 [fiancée] walked in on Carl Sullivan instead of me. I have a feeling Carl
11 Sullivan would be facing murder charges, too, if he was ever even caught.
12 So Carl Sullivan didn't succeed in taking my life the first time, so he tried
13 to run me over with the car he just stole. Well, I barely escaped with mine
14 and my dog's lives as he came crashing through the gate that goes across
15 my driveway, sustaining what could be a lifetime disability to my right
16 knee.

17 Because of the gate hitting me as he was racing towards me in the
18 car, it was obvious to me that Carl Sullivan has very little regard for human
19 life and as he crashed through the gate, sped across a very busy sidewalk
20 and onto a very busy street almost hitting several people. I knew this was
21 a violent man who was prepared and ready to kill whomever was in his
22 way, so that he may commit his crime. Now I have to wonder daily how
23 many unsolved crimes is this man responsible for –

24 * * *

25 – how many of these crimes has be not been caught and convicted

26 * * *

27 – these thoughts went through my mind as he was racing from my
28 home. By his actions after he was caught, they were clearly the actions of
a professional in his field. Receiving the maximum time provided by law
for this guy

29 * * *

30 – would be doing Carl Sullivan and the rest of society a favor.
31 Please, your Honor, keep this man off the streets and out of peoples'
homes as long as you can.

32 *Id.* at 9-12. Sullivan contends that his constitutional right to a fair sentencing was
33 violated by the following specific comment of the first victim: "To me it's apparent that
34 Mr. Sullivan was willing to kill to commit this crime." See Amended Petition, pp. 7-8.
35 And, Sullivan complains of the following specific comments of the second victim: that
36 Sullivan's "demeanor was that of a man who had killed to obtain his goal;" that he had
37 "a feeling Carl Sullivan would be facing murder charges too," if his mother or fiancée
38 had walked in on him during the burglary; that "Carl Sullivan didn't succeed in taking

1 [his] life the first time, so he tried to run [him] over with the car he just stole;" that he
2 "knew this was a violent man who was prepared and ready to kill whomever was in his
3 way, so that he may commit his crime;" and that he had "to wonder how many unsolved
4 crimes is this man responsible for." See *id.*

5 Respondents argue, in their answer, that this claim was not exhausted in state
6 court. Answer (dkt. no. 85), pp. 25-26. Respondents contend, in this regard, that, while
7 Sullivan raised a similar claim in the Nevada Supreme Court, he did not there challenge
8 all the specific comments of the victims that he complains of in federal court. *Id.*

9 A federal court may not grant habeas corpus relief on a claim not exhausted in
10 state court. 28 U.S.C. § 2254(b). The exhaustion doctrine is based on the policy of
11 federal-state comity, and is intended to allow state courts the initial opportunity to
12 correct constitutional deprivations. See *Picard v. Conner*, 404 U.S. 270, 275 (1971). To
13 exhaust a claim, a petitioner must fairly present the claim to the highest state court, and
14 must give that court the opportunity to address and resolve it. See *Duncan v. Henry*,
15 513 U.S. 364, 365 (1995) (per curiam); *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 10
16 (1992).

17 The court finds that this claim is exhausted. Sullivan's argument to the state
18 supreme court reasonably encompassed the claim made here in federal court. See Fast
19 Track Statement, Exhibit 10, pp. 6-8. Also, in the state supreme court, Sullivan cited
20 *Buschauer v. State*, 106 Nev. 890, 804 P.2d 1046 (1990), in which the Nevada
21 Supreme Court relied in part on Supreme Court precedent – albeit Supreme Court
22 precedent that had been overruled some seven years earlier. See Fast Track
23 Statement, Exhibit 10, pp. 6-8, citing *Booth v. Maryland*, 482 U.S. 496 (1987), overruled
24 in *Payne v. Tennessee*, 501 U.S. 808 (1991).

25 The Court, however, finds the claim to be meritless. The only Supreme Court
26 precedent cited by Sullivan in support of the claim is *Payne v. Tennessee*, 501 U.S. 808
27 (1991). In *Payne*, the Court overruled *Booth*, and retreated from a per se rule barring, in
28 a capital sentencing, admissibility of victim impact evidence regarding a victim's

1 personal characteristics and the victim's family's emotional trauma. In support of his
2 claim here in Ground 2, Sullivan appears to rely on dicta in *Payne*, wherein the Court
3 noted in passing that "[i]n the event that evidence is introduced that is so unduly
4 prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the
5 Fourteenth Amendment provides a mechanism for relief." *Payne*, 501 U.S. at 825.
6 Following that sentence in *Payne*, the Court cited to *Darden v. Wainwright*, 477 U.S.
7 168, 179-183 (1986), which concerned juror bias and voir dire. While this Court
8 generally agrees with the proposition that the Due Process Clause provides a
9 mechanism for relief where evidence introduced at a sentencing is so unduly prejudicial
10 that it renders the trial fundamentally unfair, the Court finds that the dicta in *Payne* is not
11 the kind of "clearly established Federal law, as determined by the Supreme Court of the
12 United States" that 28 U.S.C. § 2254(d)(1) contemplates as a basis for federal habeas
13 corpus relief.

14 Furthermore, the Court finds that the victims' statements in this case certainly did
15 not render Sullivan's sentencing fundamentally unfair. Those statements reflected the
16 victims' quite understandable emotional reaction to Sullivan's crimes. The statements
17 did not refer to any particular prior criminal acts by Sullivan, but only expressed that
18 Sullivan's crimes led the victims to wonder what other crimes Sullivan had committed.
19 As far as the victims' statements regarding the danger that Sullivan posed, the
20 statements were the victims' legitimate impressions of the perpetrator of serious, violent
21 crimes against them.²

22 Moreover, this Court assumes that the trial judge applied the law, and considered
23 only admissible evidence in sentencing Sullivan. See *Landrigan v. Stewart*, 272 F.3d

24
25 ²At the evidentiary hearing in his state habeas action, when asked on cross-
26 examination if he would have used the knife if the victim of the robbery had not left the
27 garage, Sullivan certainly did not rule out the possibility. He answered: "I doubt it. I
28 can't say for sure. Who knows? ... I mean, I'm not going to lie, I could you know. Who
knows what can happen to a person that's backed up against the wall. But I think my
prior 27 years speak volumes that I probably wouldn't have." Transcript of Proceedings
of August 6, 2003, Exhibit 30, p. 70.

1 1221, 1230 (9th Cir.2001); *Smith v. Stewart*, 140 F.3d 1263, 1272 (9th Cir.1998) (a
2 judge can “separate the wheat from the chaff”).

3 The Nevada Supreme Court’s denial of relief on this claim was not contrary to, or
4 an unreasonable application of, United States Supreme Court precedent, and was not
5 based on an unreasonable determination of the facts in light of the evidence.

6 **C. Ground 3**

7 In Ground 3, Sullivan claims that his “due process rights guaranteed by the Fifth
8 and Fourteenth Amendments to the United States Constitution were violated as the
9 result of duplicative charges which resulted from one transaction.” Amended Petition, p.
10 9.

11 The respondents contend that this claim is unexhausted in state court. Answer,
12 pp. 26-27. The Court finds, however, that Sullivan sufficiently presented the claim in
13 state court, such that it is exhausted. See Fast Track Statement, Exhibit 36, p. 6; see
14 *also* Memorandum in Opposition to, and Motion for Partial Dismissal of, Supplemental
15 Petition for Writ of Habeas Corpus (Post-Conviction), Exhibit 27, pp. 3-4 (State
16 responded to claim as a double jeopardy claim).

17 The respondents also contend that this claim is barred by the procedural default
18 doctrine. Answer, pp. 30-31. However, the Court has previously ruled that the
19 procedural default doctrine does not bar any of Sullivan’s claims. See Order entered
20 August 21, 2006, dkt. no. 43, pp. 15-17. The court of appeals did not disturb that ruling
21 on either of Sullivan’s appeals. See Memorandum Order of Court of Appeals, dkt. no.
22 53; Memorandum Order of Court of Appeals, dkt. no. 76. This Court’s ruling regarding
23 respondents’ procedural default defense remains in force pursuant to the law of the
24 case doctrine. See *United States v. Alexander*, 106 F.3d 874, 876 (9th Cir.1997) (“[A]
25 court is generally precluded from reconsidering an issue that has already been decided
26 by the same court, or a higher court in the identical case.” (*quoting Thomas v. Bible*,
27 983 F.2d 152, 154 (9th Cir.), *cert. denied* 508 U.S. 951 (1993))). The respondents have
28 not demonstrated any circumstance warranting re-examination of this court’s ruling

1 regarding their procedural default defense. See *id.* (identifying circumstances in which a
2 court has discretion to depart from the law of the case doctrine).

3 Regarding its merits, however, Sullivan's claim in Ground 3 is meritless.

4 The state district court ruled as follows:

5 ...[T]he charges were not multiplicitous. The burglary was complete
6 when Sullivan entered the home with larcenous intent. The robbery
7 occurred later when Sullivan used the threat of force to be able to flee with
8 the stolen property. The possession of stolen property was a continuing
9 offense. The charges are distinct in law and in fact and this court would
10 find that the prosecutor was not required to elect and the court was not
11 required to merge the offenses.

12 Findings of Fact, Conclusions of Law and Judgment, Exhibit 32, p. 4. The Nevada
13 Supreme Court affirmed this ruling on its merits (in the alternative to its ruling that
14 Sullivan's petition was untimely), without discussion. See *Sullivan*, 120 Nev. at 542, 96
15 P.3d at 765.

16 The Supreme Court rulings Sullivan cites in support of this claim are *Benton v.*
17 *Maryland*, 395 U.S. 784 (1969), and *Brown v. Ohio*, 432 U.S. 161 (1977). See Amended
18 Petition, p. 9; Reply, pp. 17-18. Neither of those Supreme Court precedents remotely
19 supports an argument that the state courts' ruling on this claim was objectively
20 unreasonable. Notably, in *Brown*, the Supreme Court instructed:

21 The established test for determining whether two offenses are sufficiently
22 distinguishable to permit the imposition of cumulative punishment was
23 stated in *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180,
24 182, 76 L.Ed. 306 (1932):

25 "The applicable rule is that where the same act or
26 transaction constitutes a violation of two distinct statutory
27 provisions, the test to be applied to determine whether there
28 are two offenses or only one, is whether each provision
requires proof of an additional fact which the other does not
...."

This test emphasizes the elements of the two crimes. "If each requires
proof of a fact that the other does not, the *Blockburger* test is satisfied,
notwithstanding a substantial overlap in the proof offered to establish the
crimes...." *Iannelli v. United States*, 420 U.S. 770, 785 n.17, 95 S.Ct.
1284, 1294 n.17, 43 L.Ed.2d 616 (1975).

///

///

1 *Brown*, 432 U.S. at 166. For good reason, Sullivan does not make any argument in this
2 Court, and he did not argue in state court, that conviction of the crimes of robbery,
3 burglary and possession of stolen property require proof of the same elements.

4 Moreover, in this case, not only would those three charged crimes have required
5 proof of different elements, they were based on distinctly different facts: the robbery
6 charge was based on Sullivan's theft of the automobile; the burglary charge was based
7 on Sullivan's entry of the residence to commit the thefts; and the possession of stolen
8 property charge was based on Sullivan's possession of mink coats, a camera, a
9 compact disc player, a video cassette recorder and miscellaneous jewelry stolen from
10 the residence. See Information, Exhibit 3, pp. 1-3.

11 There was no double jeopardy violation. The Nevada Supreme Court's denial of
12 relief on this claim was not contrary to, or an unreasonable application of *Benton* or
13 *Brown*, or any other United States Supreme Court precedent, and was not based on an
14 unreasonable determination of the facts in light of the evidence.

15 **D. Ground 4**

16 In Ground 4, Sullivan claims that he "was deprived of his right to due process
17 guaranteed by the Eighth and Fourteenth Amendment of the United States Constitution
18 due to the trial court's erroneous imposition of restitution in the amount of \$12,000 when
19 not a scintilla of evidence was provided to support such an exorbitant amount."
20 Amended Petition, p. 10.

21 Respondents argue that Ground 4 is unexhausted. Answer, p. 27. However,
22 Sullivan did, in his state habeas petition, raise a due process claim with respect to the
23 restitution award, and, while he made no real argument regarding that claim in the
24 Nevada Supreme Court, he alerted the court that the claim was raised. See Petition for
25 Writ of Habeas Corpus, Exhibit 16, p. 6; Fast Track Statement, Exhibit 36, pp. 5, 9-10.
26 The Nevada Supreme Court affirmed the denial of the claim without any discussion.
27 Ground 4 is exhausted.

28 ///

1 The respondents also contend that this claim is barred by the procedural default
2 doctrine. Answer, pp. 30-31. However, as is discussed above, this Court has already
3 ruled that the procedural default doctrine does not bar any of Sullivan's claims, and that
4 ruling is the law of the case. See Order entered August 21, 2006, dkt. no. 43, pp. 15-17.

5 Ground 4 is, however, without merit. Sullivan does not cite to any United States
6 Supreme Court precedent in support of this claim. See Amended Petition, p. 10; Reply,
7 pp. 18-19. Therefore, he makes no showing that the state courts' ruling on the claim
8 was "contrary to, or involved an unreasonable application of, clearly established Federal
9 law, as determined by the Supreme Court of the United States," under 28 U.S.C. §
10 2254(d).

11 Moreover, with respect to Sullivan's factual argument in support of the claim,
12 there was in fact evidence presented in state court regarding the amount of damages
13 that the victims suffered. The presentence investigation report stated:

14 During investigation, the single victim in this case was contacted by
15 the Division. The victim informed that while he did refuse medical attention
16 on the day of the instant offense after the portion of the fence struck him in
17 the back of both knees, he went to his doctor the next day. The victim
stated that he is still in pain at present, has not returned to work, and had
to walk for two weeks on a crutch.

18 The victim informed that he plans on being at sentencing to make a
19 statement to the Court. The victim informed that he is still struggling
personally and feels invaded and his dog is still spooked by the entire
incident.

20 * * *

21 Monetarily, the victim estimates that he sustained a monetary loss
22 between \$10,000 to \$12,000, as a result of medical bills, the \$300 leather
jacket that was damaged and damage to the car and home.

23 Based upon the above, restitution in the amount of \$12,000 is
24 deemed appropriate and will be made part of the recommendation.

25 Presentence Investigation Report, Exhibit 44, p. 8. And, at the sentencing hearing, the
26 first of the victims stated the following:

27 This home has been in my family since 1922, and it's always been a
28 secure place, but at this time, I'm unable to sleep. I'm being treated for
stress headaches. There's over a thousand dollars of my own money

1 that's not even covered by insurance to repair the damages that Mr.
2 Sullivan did to my home. The total damages are over \$12,000. The car
3 that he drove through my front gate is still in the shop. I'm unable to drive
4 it.

5 My [fiance'], who was there at the time, is the one that's really
6 suffered most of the damage. He was about to start a new job at the time
7 of this crime and his company had gone out of business, and when Mr.
8 Sullivan drove my car right through the front gate, he damaged the
9 cartilage in [his] knees and he can't work at a full time basis right now.

10 Transcript of Proceedings of February 13, 1998, Exhibit 7, p. 8. The other victim stated
11 that the physical injury that he suffered during the robbery could be a lifetime disability:

12 So Carl Sullivan didn't succeed in taking my life the first time, so he tried
13 to run me over with the car he just stole. Well, I barely escaped with mine
14 and my dog's lives as he came crashing through the gate that goes across
15 my driveway, sustaining what could be a lifetime disability to my right
16 knee.

17 *Id.* at 10. There was, therefore, evidence supporting the sentencing court's imposition of
18 \$12,000 in restitution.

19 In this federal habeas action, apparently in an effort to show that there was
20 evidence available that might have shown the victims' damages to be less than
21 \$12,000, Sullivan proffers as an exhibit what is purported to be a letter from an insurer.
22 See Amended Petition, p. 10; Reply, p. 19; see also Letter, Exhibit 43. It appears from
23 the record, however, that the letter was never presented in state court. See Findings of
24 Fact, Conclusions of Law and Judgment, Exhibit 32, p. 8 (State district court stated,
25 about the letter: "The Court notes that no such letter was introduced in evidence at the
26 habeas corpus hearing and thus this court cannot find that the letter exists, or that it was
27 admissible or that it was of such a nature as to have had any impact on the
28 sentencing.") A state court's decision may be assessed, under 28 U.S.C. § 2254(d),
only in light of the record before that court. See *Cullen v. Pinholster*, 131 S.Ct. 1388,
1398 (2011) ("It would be strange to ask federal courts to analyze whether a state
court's adjudication resulted in a decision that unreasonably applied federal law to facts
not before the state court."). In analyzing Ground 4 under section 2254(d), the Court
does not take into consideration the letter submitted by Sullivan as Exhibit 43.

1 The Court finds that the Nevada Supreme Court's denial of relief on this claim
2 was not contrary to, or an unreasonable application of any United States Supreme
3 Court precedent, and was not based on an unreasonable determination of the facts in
4 light of the evidence.

5 **E. Ground 5**

6 In Ground 5, Sullivan claims violations of his constitutional right to effective
7 assistance of counsel. Amended Petition, p. 10.

8 In *Strickland v. Washington*, 466 U.S. 668 (1984), the Supreme Court
9 propounded a two prong test for analysis of claims of ineffective assistance of counsel:
10 a petitioner claiming ineffective assistance of counsel must demonstrate (1) that his
11 attorney's representation "fell below an objective standard of reasonableness," and (2)
12 that the attorney's deficient performance prejudiced the defendant such that "there is a
13 reasonable probability that, but for counsel's unprofessional errors, the result of the
14 proceeding would have been different." *Strickland*, 466 U.S. at 688; *see also id.* at 694.
15 "A reasonable probability is a probability sufficient to undermine confidence in the
16 outcome." *Id.* at 694.

17 The *Strickland* framework for analyzing ineffective assistance of counsel claims
18 is considered to be "clearly established Federal law, as determined by the Supreme
19 Court of the United States" for the purposes of the 28 U.S.C. § 2254(d) analysis. *See*
20 *Pinholster*, 131 S.Ct. at 1403. Courts have recognized that a "doubly" deferential judicial
21 review is called for in analyzing ineffective assistance of counsel claims in federal
22 habeas actions. *See id.* at 1410-11. The general rule of *Strickland*, that defense
23 counsel's effectiveness is to be reviewed with great deference, gives the state courts
24 greater leeway in reasonably applying *Strickland*, which in turn "translates to a narrower
25 range of decisions that are objectively unreasonable under AEDPA." *Cheney*, 614 F.3d
26 at 995 (*citing Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). The ultimate
27 question, then, is "whether there is any reasonable argument that counsel satisfied
28 *Strickland's* deferential standard." *Harrington*, 131 S.Ct. at 788.

1 Ground 5 includes three subclaims, Grounds 5A, 5B and 5C.

2 **1. Ground 5A**

3 In Ground 5A, Sullivan claims that his right to effective assistance of counsel was
 4 violated on account of his trial counsel's "[f]ailure to investigate the case and present
 5 mitigating evidence at sentencing." Amended Petition, p. 11. There are three aspects of
 6 Sullivan's claim in this regard: first, he claims that his trial counsel "failed to interview
 7 the state's witnesses" and discover "that Sullivan was under the influence at the time of
 8 the offense," and he claims that his "mental state could have been a defense at trial or a
 9 mitigating factor at sentencing;" second, he claims that his trial counsel "failed to
 10 conduct investigation regarding the amount of damages to which Sullivan would be
 11 responsible in the form of restitution;" and third, he claims that his trial counsel "failed to
 12 present any mitigating evidence at Sullivan's sentencing hearing," and did not advise
 13 Sullivan of the importance or the opportunity to present such evidence." *Id.*

14 Respondents argue that Ground 5A is unexhausted. Answer, pp. 27-28. This
 15 Court, however, finds that Sullivan raised the claim before the Nevada Supreme Court
 16 on the appeal in his state habeas action. See Fast Track Statement, Exhibit 36, pp. 6-9.
 17 Ground 5A is exhausted.

18 The respondents also contend that this claim is barred by the procedural default
 19 doctrine. Answer, pp. 30-31. However, as is discussed above, this Court has already
 20 ruled that the procedural default doctrine does not bar any of Sullivan's claims, and that
 21 ruling is the law of the case. See Order entered August 21, 2006, dkt. no. 43, pp. 15-17.

22 The state district court ruled as follows:

23 The second claim has multiple sub-parts. Sullivan claims in part 2A
 24 of the petition that counsel rendered ineffective assistance in failing to
 25 investigate and learn that Sullivan was so intoxicated that he was unable
 26 to form the mental state required for some of the crimes. The court first
 27 finds that from their very first meeting Sullivan was adamant that he would
 28 not be going to trial. The defendant has the right to choose how to plead in
 a criminal case and a lawyer who does not undercut that authority is not
 ineffective. Furthermore, the reasonableness of an investigation will often
 turn, as it did in this case, on the information received from the client. See
Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674
 (1984). Here, the testimony at the habeas corpus hearing revealed that

1 Sullivan was not so intoxicated as to have any legal significance. The
2 court finds that if counsel had inquired of Sullivan, he would not have
3 learned that Sullivan had any potential defense to the charges. The court
4 also notes that Sullivan was fully informed of the elements of the offense
5 and voluntarily determined to plead guilty, knowing of the *mens rea* of the
6 various offenses.

7 There is also the question of prejudice from counsel's alleged
8 failure to investigate. When a conviction stems from a guilty plea, and the
9 claim is ineffective assistance of counsel in failing to investigate, the
10 petitioner bears the burden of proving that but for the failings of counsel he
11 would have insisted on a trial on all available charges and enhancements.
12 *Hill v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). The
13 court is not persuaded that if counsel had inquired further, the results of
14 the investigation would have altered counsel's advice. More importantly,
15 the court is convinced that no investigation would have altered Sullivan's
16 decision to plead guilty. The court is not persuaded that there was
17 anything counsel could have done to sway Sullivan from his decision to
18 plead guilty.

19 * * *

20 Ground 2E also included the claim that counsel was ineffective in
21 failing to present the live testimony of Dr. Hiller at sentencing. The court
22 finds no evidence that Dr. Hiller would have testified in some manner
23 different from his written report. The court further finds no evidence
24 supporting the proposition that reasonable lawyers would prefer to subject
25 a favorable witness to cross-examination when they are able to present
26 the court with a written report without the risks of cross-examination.
27 Finally, the court sees no reason to believe that the sentence would have
28 been different if only Dr. Hiller had presented live testimony at the
sentencing hearing.

Ground 2E also includes claims that counsel was ineffective in
failing to present additional mitigating testimony from various witnesses.
No such witnesses testified in the habeas corpus hearing and so the court
must find that Sullivan has failed to identify a single person who was
willing to say a kind word about him.

Ground 2F is a claim that counsel rendered ineffective assistance
in failing to present in evidence a letter in which an insurance company
assessed the compensable loss to the victims. Sullivan asserted that the
letter would have contradicted the testimony of the victims regarding
restitution. The court notes that no such letter was introduced in evidence
at the habeas corpus hearing and thus this court cannot find that the letter
exists, or that it was admissible or that it was of such a nature as to have
had any impact on the sentencing. Thus, the court finds that Sullivan has
failed to show that counsel was unreasonable or that he was prejudiced by
the performance of counsel. The court also notes that if the letter existed
and it was as described in the petition, the letter would be a hearsay
statement of an insurer's estimate of losses covered by the relevant
policy. The court finds that the amount and type of insurance available to
the victims would have had no bearing on the amount of restitution
ordered by the court. An assessment shaped by such factors as the terms

1 of an insurance policy would have no effect on a criminal court's
2 assessment of restitution.

3 * * *

4 One who would assert a claim of ineffective assistance must bear
5 the burden of showing that the performance of counsel fell below an
6 objective standard of reasonableness and that but for the failings of
7 counsel a different result was likely. *Strickland, supra*. Sullivan has failed
8 to meet that burden. His own testimony was incredible and failed to
9 persuade the court that counsel acted unreasonably in any way, or that
10 Sullivan would have pleaded not guilty, or that the sentence might have
11 been different or that the outcome of the appeal might have been different.

12 Findings of Fact, Conclusions of Law and Judgment, Exhibit 32, pp. 4-10. The Nevada
13 Supreme Court affirmed this ruling on its merits (in the alternative to its ruling that
14 Sullivan's petition was untimely), without discussion. See *Sullivan*, 120 Nev. at 542, 96
15 P.3d at 765.

16 Sullivan has made no showing that the state courts' ruling was objectively
17 unreasonable.

18 Regarding the claim that Sullivan's trial counsel was ineffective for failing to
19 interview the state's witnesses and discover that Sullivan was under the influence at the
20 time of the offense, in state court Sullivan made no showing what witnesses should
21 have been interviewed, and he made no showing what any witness would have said.
22 Furthermore, Sullivan, himself, obviously knew that he was under the influence of
23 alcohol and heroin when he committed the crimes, and he testified about that at the
24 evidentiary hearing, but the state district court reasonably found as follows:

25 Here, the testimony at the habeas corpus hearing revealed that Sullivan
26 was not so intoxicated as to have any legal significance. The court finds
27 that if counsel had inquired of Sullivan, he would not have learned that
28 Sullivan had any potential defense to the charges.

Findings of Fact, Conclusions of Law and Judgment, Exhibit 32, p. 5; see also
Transcript of Proceedings of August 6, 2003, Exhibit 30, pp. 31-36, 49-54.

Moreover, with respect to Sullivan's heroin use, his trial counsel did submit to the
sentencing court the report of a doctor who examined Sullivan; the report concerned
Sullivan's substance abuse, its effect on his commission of the crimes, and his

1 willingness to seek treatment. Sullivan complains that his counsel did not actually call
2 that doctor to testify at the sentencing, but the state courts reasonably ruled that there
3 was no showing that counsel's strategic decision in that regard was unreasonable, or
4 that there was any reasonable probability that it had any effect on the outcome of the
5 sentencing. Findings of Fact, Conclusions of Law and Judgment, Exhibit 32, pp. 7-8;
6 see *also* Transcript of Proceedings of August 6, 2003, Exhibit 30, pp. 39-40, 44.

7 Regarding Sullivan's claim that his counsel failed to adequately investigate the
8 restitution amount, in state court this argument focused on trial counsel's alleged failure
9 to investigate and make use of the insurance company's letter. The state district court,
10 though, reasonably ruled against Sullivan on that claim, pointing out that the letter was
11 not offered as evidence. See Findings of Fact, Conclusions of Law and Judgment,
12 Exhibit 32, pp. 8-9. Furthermore, Sullivan's trial counsel testified at the evidentiary
13 hearing that he made a strategic decision not to make an issue of the restitution
14 amount. See Transcript of Proceedings of August 6, 2003, Exhibit 30, pp.27-28 ("[I]t's
15 been a longstanding policy of mine, which is shared by many of my colleagues in my
16 office, to not argue restitution in a difficult sentencing such as this case, where I felt it
17 would be — it was going to be difficult to persuade Judge Adams to run any of these
18 terms concurrent.").

19 As for Sullivan's claim that his trial counsel failed to present mitigating evidence
20 at the sentencing hearing, and did not advise Sullivan of the opportunity to do so, the
21 record of the evidentiary hearing reflects that the state courts reasonably concluded that
22 "[n]o such witnesses testified in the habeas corpus hearing and so the court must find
23 that Sullivan has failed to identify a single person who was willing to say a kind word
24 about him." Findings of Fact, Conclusions of Law and Judgment, Exhibit 32, p. 8; see
25 *also* Transcript of Proceedings of August 6, 2003, Exhibit 30, pp. 13, 28-29 (trial counsel
26 testified that it was his practice to inform clients about what sort of evidence could be
27 offered at sentencing hearing), and pp. 58, 81-82 (Sullivan testified: "I was so ashamed
28 that I had committed a crime that I didn't want to present any witnesses.").

1 The state courts' denial of the claims in Ground 5A was not contrary to, or an
2 unreasonable application of United States Supreme Court precedent, and was not
3 based on an unreasonable determination of the facts in light of the evidence.

4 **2. Ground 5B**

5 In Ground 5B, Sullivan claims that his right to effective assistance of counsel was
6 violated because of his trial counsel's "[f]ailure to object to testimony of alleged
7 dangerousness at sentencing." Amended Petition, p. 12.

8 Respondents argue that Ground 5B is unexhausted. Answer, pp. 28-29. The
9 Court, however, finds that Sullivan raised this claim before the Nevada Supreme Court
10 on the appeal in his state habeas action. See Fast Track Statement, Exhibit 36, p. 8.
11 Ground 5B is exhausted.

12 The respondents also contend that this claim is barred by the procedural default
13 doctrine. Answer, pp. 30-31. However, as is discussed above, this Court has already
14 ruled that the procedural default doctrine does not bar any of Sullivan's claims, and that
15 ruling is the law of the case. See Order entered August 21, 2006, dkt. no. 43, pp. 15-17.

16 The state district court ruled as follows on this claim:

17 Grounds 2B and 2C consist of claims that counsel was ineffective
18 in failing to object to certain portions of testimony from the victims during
19 the sentencing hearing. The court first finds that the disputed testimony
20 was properly admitted and any objection would have been overruled. The
21 victims were properly allowed to voice opinions and conclusions based on
22 their observations. The court further finds that Sullivan has not adduced
23 any evidence of such persuasive force as to convince the court that
24 counsel's failure to object fell below an objective standard of
25 reasonableness. The mere fact [that] an objection might be available does
26 not mean that lawyers must voice the objection. The petitioner bears the
27 burden of showing by strong and convincing evidence that the specific
28 decisions of counsel fell below an objective standard of reasonableness.
Because no objective standard requires counsel to notice and to voice all
possible objections, it appears that Sullivan is advancing the proposition
that counsel's performance fell below a subjective standard of
reasonableness. This would not be grounds for relief even if proven.
Nevertheless, the court notes that it is not persuaded that counsel's failure
to object was unreasonable by any standard.

The court also finds that the lack of an objection gave rise to no
prejudice. It is apparent that Judge Adams decided the appropriate
sentence based on the nature of the crime and the character of the
defendant. Reasonable jurists routinely separate the wheat from the chaff

1 in sentencing hearings. *Randell v. State*, 109 Nev. 5, 7-8, 846 P.2d 278,
2 280 (1993). The court finds that the sentence would have been the same
with or without the disputed comments from the victims.

3 Findings of Fact, Conclusions of Law and Judgment, Exhibit 32, pp. 6-7. The Nevada
4 Supreme Court affirmed this ruling on its merits (in the alternative to its ruling that
5 Sullivan's petition was untimely), without discussion. See *Sullivan*, 120 Nev. at 542, 96
6 P.3d at 765.

7 To the extent that an objection by trial counsel might have been made on state
8 law grounds, the ruling of the Nevada Supreme Court that the victims' testimony
9 "was properly admitted and any objection would have been overruled," is binding.
10 Findings of Fact, Conclusions of Law and Judgment, Exhibit 32, p. 6. And, as for any
11 possible objection on federal constitutional grounds, this Court has determined that the
12 testimony of the victims did not render Sullivan's trial fundamentally unfair, and that it
13 did not violate Sullivan's federal constitutional right to due process of law. See
14 Discussion, *supra*, Section IV.B.

15 The Court, therefore, finds objectively reasonable the conclusions of the state
16 courts, that Sullivan's trial counsel did not perform unreasonably in not objecting to the
17 challenged comments of the victims, and that even if counsel had objected to the
18 challenged comments, there is no reasonable probability that the outcome of the
19 sentencing would have been different.

20 3. Ground 5C

21 In Ground 5C, Sullivan claims that his right to effective assistance of counsel was
22 violated because of his trial counsel's "[m]isrepresentation as to the potential sentence."
23 Amended Petition, p. 12. Sullivan claims that his trial counsel "assured him that the
24 court would impose concurrent sentences," and he claims that assurance induced him
25 to plead guilty. *Id.*

26 The respondents contend that this claim is barred by the procedural default
27 doctrine. Answer, pp. 30-31. However, as is discussed above, this Court has already

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1 ruled that the procedural default doctrine does not bar any of Sullivan's claims, and that
2 ruling is the law of the case. See Order entered August 21, 2006, dkt. no. 43, pp. 15-17.

3 The state district court ruled as follows on this claim:

4 Ground 2D was a claim that the plea was based on a guarantee of
5 concurrent sentences. Sullivan's testimony on this point was false. The
6 court finds that no promises were made by defense counsel. The court
7 further finds that even if Sullivan had some belief that concurrent
8 sentences were assured when he entered the courtroom to enter his plea,
9 the court disabused him of any notion that he could be assured of any
10 specific sentence. Thus, the court finds that the plea was voluntary and
knowing. The court also notes that a subjective expectation of leniency,
not caused by the prosecutor or the court, is not grounds to invalidate a
guilty plea. *Rouse v. State*, 91 Nev. 677, 541 P.2d 643 (1975). Thus, even
if Sullivan's testimony were true, the court would not set aside the
judgment of conviction.

11 Findings of Fact, Conclusions of Law and Judgment, Exhibit 32, p. 7. As with Sullivan's
12 other claims of ineffective assistance of counsel, the Nevada Supreme Court affirmed
13 this ruling on its merits (in the alternative to its ruling that Sullivan's petition was
14 untimely), without discussion. See *Sullivan*, 120 Nev. at 542, 96 P.3d at 765.

15 Central to the state courts' ruling is the state district court's finding that Sullivan's
16 testimony at the evidentiary hearing was not believable, but his trial counsel's was.

17 That court stated in this regard:

18 The court initially notes that [trial counsel] was credible and Sullivan
19 was not. In particular, the court notes that at least part of Sullivan's
20 testimony was blatantly false, thus calling the balance of his testimony into
question. Because of that, and other factors, the court resolved evidentiary
conflicts by believing [trial counsel] and not believing Sullivan.

21 Findings of Fact, Conclusions of Law and Judgment, Exhibit 32, p. 3. And, again, with
22 regard to the particular claim that Sullivan relied upon assurances by his counsel that he
23 would receive concurrent sentences, the state district court stated:

24 Sullivan's testimony on this point was false. The court finds that no
25 promises were made by defense counsel.

26 *Id.* at 7. The state district court's finding regarding the relative credibility of Sullivan and
27 his trial counsel is not unreasonable in light of the evidence. See, e.g., Transcript of

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1 Proceedings of August 6, 2003, Exhibit 30, pp. 10-11 (testimony of trial counsel), and
 2 pp. 53-56, 58-59 (testimony of Sullivan).

3 The Court finds objectively reasonable the conclusions of the state courts, that
 4 Sullivan's trial counsel did not assure him that he would receive concurrent sentences,
 5 and that, therefore, Sullivan has not shown any ineffective assistance of his counsel as
 6 alleged in Ground 5C.

7 **V. CERTIFICATE OF APPEALABILITY**

8 The standard for issuance of a certificate of appealability calls for a "substantial
 9 showing of the denial of a constitutional right." 28 U.S.C. § 2253(c). The Supreme Court
 10 interpreted 28 U.S.C. §2253(c) as follows:

11 Where a district court has rejected the constitutional claims on the merits,
 12 the showing required to satisfy §2253(c) is straightforward: The petitioner
 13 must demonstrate that reasonable jurists would find the district court's
 assessment of the constitutional claims debatable or wrong.

14 *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); see also *James v. Giles*, 221 F.3d 1074,
 15 1077-79 (9th Cir.2000). The Supreme Court further illuminated the standard in *Miller-El*
 16 *v. Cockrell*, 537 U.S. 322 (2003). The Court stated in that case:

17 We do not require petitioner to prove, before the issuance of a COA, that
 18 some jurists would grant the petition for habeas corpus. Indeed, a claim
 19 can be debatable even though every jurist of reason might agree, after the
 COA has been granted and the case has received full consideration, that
 20 petitioner will not prevail. As we stated in *Slack*, "[w]here a district court
 has rejected the constitutional claims on the merits, the showing required
 21 to satisfy § 2253(c) is straightforward: The petitioner must demonstrate
 that reasonable jurists would find the district court's assessment of the
 constitutional claims debatable or wrong."

22 *Miller-El*, 123 S.Ct. at 1040 (quoting *Slack*, 529 U.S. at 484).

23 The court has considered the issues raised by Sullivan, with respect to whether
 24 they satisfy the standard for issuance of a certificate of appeal, and the court
 25 determines that none do. The court will deny Sullivan a certificate of appealability in all
 26 respects.

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1 **VI. CONCLUSION**

2 It is therefore ordered that that petitioner's Amended Petition for Writ of Habeas
3 Corpus (dkt. no. 14) is denied.

4 It is further ordered that petitioner is denied a certificate of appealability.

5 It is further ordered that the Clerk shall enter judgment accordingly.

6 DATED THIS 31st day of July 2014.
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10 MIRANDA M. DU
11 UNITED STATES DISTRICT JUDGE
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